GOH KOON SUAN

v.

HENG GEK KIAU

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-286-1990]
23 JUNE 1997

TRUSTS: *Resulting trust - Presumption - Whether rebuttable - How to rebut presumption of trust - Land purchased in the name of mistress - Purchase price paid by plaintiff and title documents in plaintiff's custody - Whether presumption of trust in favour of plaintiff arises*

TRUSTS: *Resulting trust - Presumption of advancement - Purchase of land in the name of mistress - Whether presumption of advancement arises - Whether such presumption only arises where land purchased in the name of wife or children - Whether presumption of advancement displaced in light of modern social conditions*

The plaintiff purchased a property and registered it under the name of his mistress, the defendant. The plaintiff claimed that he told the defendant to hold it on trust for him. The defendant however claimed that it was an outright gift for her and refused to transfer the property to the plaintiff. The plaintiff then commenced this action against the defendant seeking, *inter alia*, a declaration that the defendant held the property in trust for him absolutely and an order that the defendant executes a valid and registrable transfer in favour of him.

Held:

[1] Since the defendant was not a child nor the wife of the plaintiff, the presumption that arises and should arise would be not one of advancement in favour of the defendant but rather one of trust in favour of the plaintiff. The onus therefore shifted to the defendant to rebut the presumption of trust.

[2] The presumption of trust in favour of the plaintiff can be rebutted by admissible evidence which would negative the presumption of trust. The admissible evidence by way of rebuttal must relate to acts, circumstances and declarations at the time when the property in question was purchased. In the present case, however, there was nothing in evidence to rebut the presumption of trust in favour of the plaintiff and thus the defendant had failed to discharge the onus of proof to rebut the presumption.

[3] Judgment should be given to the plaintiff as he paid the full purchase price of the property and further, the document of title relating to the property was in the custody of the plaintiff.

[4] In the context of modern social conditions the principle of advancement has been displaced forever for to hold otherwise would tantamount to (i) taking a backward step thereby stifling the development of the law; (ii) running counter to the mainstream of prevailing authorities; and (iii) performing the function of the legislature.

[Claim allowed.]

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Ltd [1995] 4 CLJ 283 ***(dist)***
Chua Cheow Tien v. Chua Geok Eng & Anor [1968] 2 MLJ 180 ***(refd)***
Commodore Pty Ltd v. Perpetual Trustee [1984] 1 NZLR 324 ***(refd)***
Dyer v. Dyer [1788] 2 Cox Eq Cas 92 ***(foll)***
Fowkes v. Pascoe [1875] 10 Ch App 343 ***(foll)***
Gissing v. Gissing [1971] AC 886 ***(foll)***
Hadmor Productions v. Hamilton [1983] 1 AC 191 ***(refd)***
Law Tanggie v. Untong Ak Gantang & Anor [1993] 2 MLJ 530 ***(foll)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667 ***(foll)***
Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene [1995] 1 MLJ 115 ***(refd)***
Mohamad Safuan Wasidin & Anor v. Mohd Ridhuan Ahmad (an infant) [1994] 2 MLJ 187 ***(foll)***
Muniandy & Anor v. Muhammad Abdul Kader & Ors [1989] 2 CLJ 577 ***(foll)***
Pettitt v. Pettitt [1970] AC 777 ***(foll)***
Powell & Wife v. Streatham Manor Nursing Home [1915] AC 243 ***(foll)***
Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(dist)***
Soar v. Foster [1858] 4 K & J 152 ***(foll)***
Tan Cheng Hock v. Chan Thean Soo & Anor [1987] 2 MLJ 479 ***(foll)***
Wan Naimah v. Wan Mohamad Nawawai [1974] 1 MLJ 41 ***(foll)***
Warren v. Gurney & Anor [1944] 2 All ER 472 ***(refd)***
Yeoh Chen Han v. Official Administrator, Malaya [1972] 2 MLJ 7 ***(foll)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 18, rr. 8(1), 10(1)

For the plaintiff - Ho Thian Cheh; M/s Ho Thian Cheh & Co
For the defendant - LY Oon; M/s Leng & Co

Reported by Izzaty Izzudin

JUDGMENT

Abdul Malik Ishak J:

In the statement of claim, the plaintiff claimed at para. 9 for:

(a) a declaration that at all material times the defendant held the said property (referring to a piece of land comprised in HS (D) 25178 (now known as HS (D) 159701) Lot PTD 17446 containing an area of 3,200 sq. feet in the Mukim of Pulai, District of Johor Bahru, Johore, together with a semi-detached house erected on it, hereinafter referred to as the "said property") in trust for the plaintiff absolutely;

(b) an order that the defendant executes a valid and registrable transfer in favour of the plaintiff;

(c) that the defendant gives an account of all income received by her in relation to the said property;

(d) costs or such other or further relief as this Honourable Court may deem fit or just.

The brunt of the plaintiff's case was that the defendant was holding the said property on trust for the plaintiff absolutely.

The plaintiff was a foreigner. A Singaporean to boot with. The plaintiff proudly declared that he was a married man and kept the defendant as his mistress. The defendant originally hailed from Indonesia and initially landed in Singapore and there she met the plaintiff – a casanova of a sort. The plaintiff said that he met the defendant at the roadside at Braddel Road, Singapore. It was the plaintiff's version that when he saw the defendant, he hooted his horn and stopped the car. The defendant agreed to join him in his car. The plaintiff then gave the defendant his phone number and she began contacting him. To him she was an easy prey. The defendant gave her version of how she met the plaintiff. It ran like this. Sometime between 1968 to 1969 the defendant was staying with her relative at Toa Payoh, Singapore and at the same time she was working as a baby sitter. The defendant stated that the plaintiff used to come down to Toa Payoh's children playground where she brought the children, whom she baby sat, to play. The plaintiff was then looking for his friend there. It was at the playground that the plaintiff met her and there they exchanged phone numbers. In due course, according to her, the plaintiff contacted her. The defendant was adamant and denied meeting the plaintiff at the roadside of Braddel Road, Singapore.

Be that as it may, there was no denying that they both met in Singapore and being a man he "succumbed to the stirring of his loins" (per Vincent Ng J. in *Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene* [1995] 1 MLJ 115). She was a fresh young thing about 18 or 19 and he whispered nothings in

her ear. He succumbed to her beauty and she succumbed to his wealth. A thing of beauty is always a joy forever, its loveliness increases and it will never pass into nothingness. She remained throughout as his mistress. At the time of the trial the plaintiff was 60 years' old while the defendant was 44 years old. The defendant still appeared vibrant and the beauty in her stood apart. It was not surprising that the plaintiff fell for her.

Sometime in the early part of 1980, the plaintiff decided to invest in Malaysia by purchasing the said property. To the plaintiff, that purchase was for two reasons. Firstly, as an investment and, secondly, he wanted a convenient place to sustain his on going intimate relationship with the defendant. According to the plaintiff he purchased the said property in the name of the defendant and told her that she held it on trust for him. The notes of evidence at pp. 7 and 8 bore sterling witness of the plaintiff's stand in relation to the purchase of the said property. The notes of evidence contained the following recital:

> Sometime in 1975/1976 the defendant married a Malaysian by the name of Wong Toon How. I attended the wedding. I did not marry her because I already got a family. She was my mistress.

That was a marriage of convenience. The defendant was not allowed entry into Singapore and the only way out was for the defendant to marry a malaysian in the person of Wong Toon How. That was a registry marriage but it did not end up in bed. The marriage was not consummated. Wong Toon How was like a eunuch who was willing to marry a beauty but unwilling to consummate the marriage. Mr. Ho Thian Cheh, the learned counsel for the plaintiff, had the pleasure of cross-examining Wong Toon How where it was put to him that he could claim her as his wife and enjoy all benefit attached thereto. The answer was rather surprising. Wong Toon How replied that he did not have any benefit accruing from that marriage. In 1989, the High Court in Johor Bahru granted a divorce that was sought for by Wong Toon How from the defendant.

The notes of evidence further contained the following pieces of evidence:

> Notwithstanding the marriage, my intimate relationship with the defendant continued. In early 1980 I became interested to purchase a property in Malaysia. This was for the purpose of investment. Apart from that I wanted to purchase a house in Malaysia especially in Johor Bahru for the convenience of meeting the defendant, my mistress. This was for the purpose of meeting intimately the defendant. Towards that end I decided to purchase a single storey semi-detached house from Mah Seng Development Sdn Bhd in Scudai for RM61,100.00. I bought it in the name of the defendant and she held it in trust for me. From what I understood at that time Singaporeans were not allowed to buy properties in Malaysia. The name of my friend is one Chan Meng. This

> is the first property I purchased in Malaysia. I told her that it would be used as a convenient place for our meeting as I was told by Chan Meng that Singaporeans could not buy properties in Malaysia so I would be using her name to buy that property and she would hold that property in trust for me.

Of pertinence, the defendant agreed to the arrangement as suggested by the plaintiff. This was what the plaintiff said in his testimony under oath:

> The purchase price and all legal disbursements would be paid by me. The defendant agreed to the agreement, so I contacted Chan Meng. I visited the property to have sight of the property while it was under construction. Right from the start I did not tell the defendant that I bought the property as a gift to her. Why should I present her a house as she already got a husband.

Evidence was led to show that the plaintiff paid the full purchase price of RM61,100 for the said property. The plaintiff too incurred additional expenses in the sum of RM5,000 that was due to the original purchaser of the said property, namely, Eng Pue Hee @ Ng Pue Hee. It must be emphasised that the fact that the plaintiff had paid the full purchase price of the said property was not seriously challenged in cross-examination by counsel for the defendant. The notes of evidence at p. 43 clearly showed once again that the plaintiff purchased the said property and registered it in her name in trust for the plaintiff. This was what the plaintiff said under cross-examination:

> In 1981 I bought a house and registered it in her name in trust for me. I told her this just before I purchased the house ... .

In my judgment, the defendant was in fact holding onto the said property in trust for the plaintiff for the simple reason that throughout the entire cross-examination of the plaintiff, Miss L.Y. Oon for the defendant saw it fit not to put to the plaintiff that the plaintiff's allegation that the defendant held the said property on trust for the plaintiff was not true. It goes without saying and on the balance of probabilities there was more than sufficient evidence for me to hold that the plaintiff had paid the full purchase price for the said property. Towards this end, ample corroboration can be garnered from the following salient facts:

(1) An assignment of the rights to the said property by Eng Pue Hee @ Ng Pue Hee dated 10 February 1981 to the defendant for the total consideration of RM26,385.

(2) The plaintiff paid a sum of RM7,000 by way of deposit in regard to that assignment and this fact can be seen at p. 11 of the notes of evidence. The photostat receipt was also marked as an exhibit while the original receipt dated 11 February 1981 was held by the plaintiff as reflected in exh. P1.

(3) The balance of that assignment amounting to RM19,385 was paid by the plaintiff to Messrs A.L. Looi, advocates and solicitors, in cash on 15 February 1981. The original receipt thereof was held by the plaintiff and marked as exh. P2. The notes of evidence at p. 11 thereof would support this. It must be emphasised that this piece of evidence was not challenged by way of cross-examination.

Cross-examination is an indispensable tool to put across one's case to the opposite party. In cross-examination, leading questions may be put and the right to cross-examine is not limited by the materials adduced during examination-in-chief but it extends to the whole of the issues in the action. Miss L.Y. Oon did not utilise her right to cross-examine to the fullest extent.

(4) There was evidence that the plaintiff effected payment to:

(a) Messrs A.L. Looi by way of cash on 15 February 1981 in the sum of RM1,677 and the original receipt was in the plaintiff's possession as can be seen in exh. P3.

(b) Messrs A.L. Looi too received payment of RM506 being the costs and disbursements relating to the assignment and the Power of Attorney. This piece of evidence can be seen at p. 16 of the notes of evidence and supported by the original receipt kept by the plaintiff as reflected in exh. P6.

(c) Messrs A.L. Looi received payment of RM156 on 23 May 1981 being part payment of costs and disbursements relating to the said property. The copy of that receipt can be seen in bundle "IDP 39" while the original which was kept by the plaintiff was marked as exh. P8. All these were amply set out at p. 18 of the notes of evidence.

(d) Messrs A.L. Looi too received progress payment of RM9,165 in regard to the said property by way of a OUB banker's draft pursuant to and in response to a letter from the said solicitors. That letter was dated 12 May 1981 and the original thereof was kept by the plaintiff and marked as exh. P5. The original receipt for the sum of RM9,165 was marked as exh. P11 and all these were not challenged at all by way of cross-examination.

(e) Messrs A.L. Looi again received payment of RM9,165 on 18 July 1981 and that payment was for the purchase of the said property pursuant to a letter dated 8 July 1981 from the said solicitors. That

letter, its original copy was kept by the plaintiff and marked as exh. P12. The notes of evidence at p. 22 clearly showed that there was no cross-examination on this point.

(f) Messrs A.L. Looi received payment of RM9,165 on 28 April 1982 from the plaintiff by way of a UOB bank draft. This was after the plaintiff received a letter dated 13 April 1982 (exh. P13) which sought payment of RM1,291 as costs and disbursements which amount was paid by UOB bank draft as seen in bundle "IDP3" where the plaintiff's name appeared therein as the remitter. A copy of the receipt for that payment was in bundle "IDP41" while the original receipt which was held by the plaintiff was marked as exh. P16. These were not challenged at all by way of cross-examination.

(g) A sum of RM6,110 was paid by the plaintiff to Mahseng Development Sendirian Berhad - the developers of the said property pursuant to a letter from Messrs A.L. Looi dated 14 April 1982. Payment was made by way of UOB banker's draft as seen at bundle "IDP7". The original of that letter and the remitter's portion were marked as P15 and P18 respectively and they were held by the plaintiff all along. And this can amply be seen at pp. 24 and 28 of the notes of evidence. Again no cross-examination was forthcoming.

(h) On 26 November 1982, the plaintiff proceeded to the office of Messrs A.L. Looi pursuant to a letter from them dated 10 November 1982 and paid the sums of RM12,220 and RM3,055 respectively being further progress payments towards the purchase of the said property. A copy of that letter can be seen in bundle "IDSP 10" while the original was kept by the plaintiff and marked as exh. P19. The plaintiff paid the sum of RM12,220 by way of a UOB bank draft in favour of Mahseng Development Sdn Bhd, the developers of the said property. The remitter's portion can be seen at "IDP8" while the original was in the plaintiff's possession and marked as exh. P21. Again a copy of the receipt from the developer can be seen at "IDP42" and the original receipt which was held by the plaintiff was marked as P22. The plaintiff also paid RM3,500 to Messrs T.K. Lim & Co pursuant to exh. P19 by way of a UOB bank draft of which a copy thereof appeared as bundle "IDP4". The original remitter's portion in exh. P23 was in the plaintiff's possession all the while. All these can be seen at pp. 29, 30, 31 and 32 of the notes of evidence and again they were not challenged in cross-examination.

(i) Messrs A.L. Looi received payment from the plaintiff on 30 January 1983 in the sum of RM179. This was the payment for the stamp fee pursuant to a letter dated 17 January 1983 from the same solicitors. That letter can be seen at bundle "IDSP14" and the original which was kept by the plaintiff was marked as exh. P24. A copy of the receipt for that payment appears at "IDP43" while the original receipt which was kept by the plaintiff was marked as exh. P25. All these too were not challenged by way of cross-examination and they can readily be seen at pp. 33 and 34 of the notes of evidence.

(j) At p. 35 of the notes of evidence, the plaintiff paid disbursements of RM3,809 for the purchase of the said property and it went unchallenged. There was no cross-examination as can be seen at p. 35 of the notes of evidence.

An argument was advanced and it was contended by the defence that the said property was purchased by the plaintiff as an outright gift for the defendant. Indeed if this was the defendant's stand then it was a clear-cut affirmation of the plaintiff's stand throughout that he had paid the full purchase price. Of pertinence to note would be p. 49 of the notes of evidence where the plaintiff was questioned in this way:

> Question: You didn't bother to ask because you intended to purchase and in fact purchased the property as a gift to the defendant?

The question couched in this manner was a recognition of the fact that the plaintiff paid the full purchase price for the said property. Again at para. 3 of the statement of defence it was pleaded, *inter alia*, that "... all payments made towards the purchase of the said land which was done by the plaintiff was for the purpose of making an absolute gift to the defendant."

Mr. Ho Thian Cheh, the learned counsel for the plaintiff, was absolutely correct when he submitted that the plaintiff's evidence was almost always direct, unequivocal and straight forward. There were occasions when the plaintiff sounded so crude and the language he employed was brutally frank. At times it was frankly brutal. These must indeed be the features of a truthful witness. The notes of evidence do not lie and the relevant parts thereto merit reproduction. For starters, references to the following are germane:

(a) The plaintiff confessed that his "intimate relationship with the defendant continued" and she remained as his mistress notwithstanding the fact that the defendant was married to Wong Toon How. This can be seen at p. 7 of the notes of evidence.

(b) The plaintiff testified in typical male chauvinism as can be seen at p. 460 of the notes of evidence:

> If you can get another woman after marriage is still better. Forbidden fruit tastes better.

(c) The rich plaintiff declared solemnly at p. 41 of the notes of proceedings particularly in regard to the many clandestine meetings he had with the defendant. The plaintiff seemed to be thoroughly enjoying himself. This was what the plaintiff testified:

> At the beginning, we used to put in a hotel - a sleazy and cheap hotel. Later I used my friend's vacant room - this was also in Singapore. I borrowed the vacant room from my friend. I did not rent it. Once in a while she would put up in the vacant room.

(d) There was evidence that the defendant was jailed for being in possession of a forged international Malaysian passport and she spent time at the famous Pudu prison in Kuala Lumpur. The plaintiff's concern for her was minimal. This was what the plaintiff said at p. 41 of the notes of evidence:

> In 1975, the defendant was arrested by the Malaysian authority and was serving sentence in Pudu prison where I visited her only once (witness raised one finger to indicate that he met her once).

(e) It was put to the plaintiff that all the progress payments made by him in respect of the said property was for the purpose of an outright gift to the defendant. The plaintiff replied in unequivocal terms as seen at pp. 35 and 36 of the notes of evidence:

> From the beginning, I made it clear to her in regard to the purchase of the property that I would be investing under her name and she would be acting as a trustee. This was also an arrangement for my convenience more to meet her.
>
> I have no intention of giving that house to her outright as a gift even though I have slept with her. I have helped her financially.

(f) The final salvo came when the plaintiff, admittedly a solid businessman with interest in many areas, was asked whether the defendant was employed between July 1980 to July 1981. His rather frank and brutal reply can be seen at p. 37 of the notes of evidence and it was worded thus:

> She was not engaged in any employment between those dates. She had no job. She enjoyed herself - 'makan, minum, enjoy'.

The damning feature in this case against the defendant was the fact that the plaintiff was in possession of all the relevant documents pertaining to the purchase of the said property. At p. 37 of the notes of evidence, the testimony of the plaintiff went like this:

> The title deed is now held by me. In fact it was with me all the time. This is also in regard to all the documents - sale and purchase agreement, receipts and letters were all along been in my possession.

There were other documents that were kept by the plaintiff and these included:

(a) all the original letters emanating from Messrs A.L. Looi regarding the purchase of the said property were forwarded to the plaintiff's address in Johor Bahru, to wit, No: 136, Jalan Lumba Kuda, Johor Bahru the address of the plaintiff's friend by the name of Chan Meng. In the course of the trial, these letters were marked as exhs. P4, P5, P6, P7, P10, P12, P13, P15, P19, P20 and P24. Copies of these letters can be seen at bundle "IDSP" at pp. 1 to 14 thereof.

(b) all the original receipts of the payments made by the plaintiff to Messrs A.L. Looi in regard to the said property can be seen in exhs. P1 ("IDP35"), P2 ("IDP36"), P3 ("IDP37"), P8 ("IDP39"), P11 ("IDP40"), P16 ("IDP41"), P22 ("IDP42") and P25 ("IDP43").

(c) the original receipt (P26) of a payment made by Eng Pue Hee @ Ng Pue Hee, the assignor of the said property, to Mahseng Development Sdn Bhd, the developer dated 15 July 1980 together with a copy of another receipt ("IDP2") in respect of another payment made by the same person.

(d) the originals of the remitter's portions in the plaintiff's name can be seen at exhibits:

P17 in bundle IDP at page 3 - RM1,291.50.

P18 in bundle IDP at page 7 - RM6,110.00.

P21 in bundle IDP at page 8 - RM12,220.00.

P23 in bundle IDP at page 4 - RM3,055.00.

(e) a copy of the instructions concerning the assignment of rights over the said property from Eng Pue Hee @ Ng Pue Hee to the defendant dated 10 February 1981 as reflected in the bundle of "IDSP 11" at p. 3 thereof.

(f) two duly stamped copies of the sale and purchase agreement entered into between the defendant and Mahseng Development Sdn Bhd dated 25 April 1981 as seen in exh. P9 which was held by the plaintiff since he collected the same in May 1981.

Now, all these documents which were in the possession, custody or control of the plaintiff was not challenged nor disputed in cross-examination. So, when the defendant as trustee refused to transfer the said property to him, he had no choice but to lodge a caveat thereto as reflected in bundle "IDP" at pp. 9 to 13. The defendant testified that she was aware of the caveat and the assertions by the plaintiff in the statutory declaration that supported the application for the entry of the caveat to the effect that she held the said property in trust for him but all the same she took no action to remove the caveat over the last 5 1/2 years. She must have been advised that the life span of a private caveat was six years.

Onus Of Proof

The plaintiff must discharge that onus on the balance of probabilities. Gill FJ in *Yeoh Chen Han v. Official Administrator, Malaya* [1972] 2 MLJ 7 FC. writing for the Federal Court had this to say:

> Assuming that the learned judge was right in rejecting the evidence of Kuan (PW3) altogether, he still had to consider the evidence of the plaintiff. In dealing with that evidence he had to consider whether it was inherently improbable. There is nothing in his grounds of judgment to suggest that he considered it to be so.

The plaintiff here was entitled to succeed in law if there was no inherent improbability in his evidence. There was in fact, in my judgment, no inherent improbability in the evidence of the plaintiff whatsoever. There was concrete evidence all the way supporting the plaintiff's claim. It was my judgment and I so hold accordingly that the plaintiff purchased the said property in the defendant's name and that she held it on trust for him ought to be accepted as the gospel truth because:

(1) It was consistent with his straight-forward unequivocal and unshaken testimony throughout.

(2) The plaintiff's testimony in regard to the full payment of the purchase price of the said property was not disputed nor challenged in cross-examination. This gave rise to the inevitable legal consequence that the defendant held the said property in trust for him.

(3) It was consistent with the twin objects of the purchase of the said property. Firstly, for investment in Malaysia. Secondly, as a convenient place to meet the defendant.

(4) There was no inherent improbability in the plaintiff's evidence.

(5) The plaintiff's demeanour was par excellance. He portrayed well - as a witness of truth.

(6) There was corroboration in the form of all those documents that were referred to in the early part of this judgment and these documents showed that the plaintiff took extra care and effort to keep track of all the developments in regard to the purchase of the said property. These are acts which are alien to the defence contention that the plaintiff purchased the said property as an outright gift to the defendant.

There was a striking feature in the present case. It was a striking factor that propelled it ahead and made it a difference from all the other cases. It was this. The relationship between the plaintiff and the defendant was a relationship between a rich married man and a beautiful but poor mistress. On the evidence and the pleadings, that relationship can never be denied. In fact it was not disputed at all. It is germane to mention that the plaintiff's assertion in examination-in-chief that the defendant was his mistress was left unchallenged. Thus, the presumption of advancement which arises when a man buys property in the name of his wife does not and cannot arise in the present case. As Chua J. observed in *Chua Cheow Tien v. Chua Geok Eng & Anor* [1968] 2 MLJ 180 especially at p. 185 of the report:

> The settled law is that if A buys property in the name of B, who is no relative, B is held to be trustee of that property for A but if B is a child or a wife of A no such trust is presumed and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father.

Now, since the defendant was not the child nor the wife of the plaintiff, the presumption that arises and should arise would be not one of advancement in favour of the defendant but rather one of trust in favour of the plaintiff. The onus therefore shifted to the defendant to rebut the presumption of trust.

I need to say something about the *Chua Cheow Tien's* case. There the key issue was whether or not there was evidence which established that in 1951 the plaintiff intended his daughter (the first defendant) and his wife (the second defendant) to hold the relevant property in trust for the plaintiff. It was in 1951 that the plaintiff purchased the relevant property in the names of the defendants. However, because of the admitted relationship between the parties, the presumption of a gift in favour of the defendants arose and the onus was on the plaintiff to adduce evidence to rebut the presumption. The court had to consider the crucial question of: "... by what evidence can the presumption be rebutted?" Chua J. answered it in this way:

> The admissible evidence in rebuttal, (according to the authorities), is limited to acts, circumstances and declarations leading to or to forming part of the transaction or so immediately following and connected with it as in effect to be contemporaneous with or form part of it and such admissible evidence can be used either for or against the party who did the act or made the declaration. Subsequent acts and declarations are admissible as evidence only against the party who did the acts or made the declarations and not in his favour.

The court in *Chua Cheow Tien (supra)* then proceeded to examine and in so doing it considered whether the presumption had been rebutted. In considering this vital question the court took into consideration, *inter alia*, the fact that the plaintiff held the title deeds. This was what Chua J. said in that case:

> The fact that the plaintiff held the title deeds is a very significant factor. In *Scawin v. Scawin* [1841] 1 Y. & C.C.C. 65; 62 E.R. 792, a father bought shares in the name of his son but retained the share certificate. It was observed by Knight Bruce V.C. (at page 793):-
>
> > The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title deeds and the dividends; but although those circumstances may exist in such cases, yet they are circumstances in favour of the father, especially where the son is adult'.

Reverting back to the matter of the retention of the title deeds, Chua J. in assessing its significant evidential value cited favourably the case of *Warren v. Gurney & Anor* [1944] 2 All ER 472 where Morton L.J. remarked at p. 473 of the report:

> The second contention put forward by counsel for the appellants was that on the admissible evidence, the judge was not justified in coming to the conclusion that the defendants had rebutted the presumption of advancement. In my view, there was ample evidence to justify that conclusion of the judge. In the first place, there is the fact that the father retained the title deeds from the time of purchase to the time of his death. I think that is a very significant fact because title deeds, as was said in Coke on Littleton, are 'sinews of the land.' One would have expected the father to have handed them over, either to the plaintiff or her husband, if he had intended the gift.

In *Chua Cheow Tien's* case the relevant property was purchased by the father but the conveyance was in the name of the daughter, the appellant. The title deeds, however, were retained by the father. Although a presumption of advancement arose, the court there held that it had been rebutted, *inter alia*, by the father's retention of the relevant title deeds.

In the present case, the critical question to be posed would be: Whether the defendant has adduced admissible evidence to rebut the presumption of trust in favour of the plaintiff having regard to the fact that the said property was

bought by the plaintiff in the defendant's name? The onus on the defendant was simply to adduce rebuttal evidence "limited to acts, circumstances and declarations leading to or to forming part of the transaction or so immediately following and connected with it as in effect to be contemporaneous with or form part of it ..." (per Chua J in *Chua Cheow Tien's* case).

It is now known that in the present case, the transaction in question was the purchase of the said property on 25 April 1981. Has the defendant adduced admissible evidence of acts, circumstances and declarations on or about 25 April 1981 to negative the presumption of trust? The admissible evidence by way of rebuttal must relate to acts, circumstances, and declarations at the time when the said property was purchased (*Warren v. Gurney & Anor (supra)*). In Warren's case for instance, the document in the nature of a subsequent declaration by the alleged donor was held to be admissible because it was against the donor's interest. I now propose to examine the evidence of the defendant to see whether the defendant has succeeded in adducing admissible evidence of acts, circumstances and declarations on 25 April 1981 - the date of the purchase of the said property, to negative the presumption of trust.

At p. 69 to p. 70 of the notes of evidence, the defendant testified in examination-in-chief:

> Before 1981, the plaintiff always mentioned to me that if he has money he would buy me a house, so that I could bear him some children. In 1981 the plaintiff bought for me a property in Johor Bahru and he did not tell me that he registered the property in my name as his trustee. The plaintiff told me that he bought the property for me and for our children.

I have perused through the evidence of the defendant with a toothcomb and I could not find anything in the entire examination-in-chief concerning the discharge of the presumption of trust in favour of the plaintiff on the part of the defendant. That being the case, the conclusion was obvious and that was that the defendant has failed to discharge that onus of proof. The defendant's version of the whole episode could be seen from her statement of defence. At para. 3 of the statement of defence, the defendant averred that the plaintiff purchased the said property for the purpose of making an absolute gift to her. At para. 8 of the statement of defence, it was pleaded that the defendant as the registered proprietor has a title which was indefeasible. At para. 9 of the statement of defence, it was pleaded that the plaintiff and the defendant had at all material times decided that the defendant was to have all interests in the said property.

Taking the indefeasibility issue first, reference to *Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene (supra)* should be made once again. There, Vincent Ng J. said at p. 128 of the report:

> I hold that this provision (referring to section 340 of the National Land Code, 1965) is inapplicable in a case where a claimant could, by adducing facts or circumstances prove, on a balance of probabilities that the property was held in trust in his or her favour; and the current case is such case.

Briefly, in *Loo Cheng Suan Sabrina v. Khoo Oon Jin Eugene (supra)* the court there held that the plaintiff had married the defendant according to the Chinese customary rites. By reason of that marriage and having regard to the fact that the defendant there had purchased the relevant property in her name, a presumption of gift and/or advancement arose. The defendant was able to rebut that presumption since he had, *inter alia*, at all material times dealt with the property as he wished with the acquiescence of the plaintiff. By comparison, in the present case the defendant was the mistress of the plaintiff and it was for this reason that there was no presumption of advancement. Since the plaintiff supplied all the funds for the purchase of the said property, a presumption of trust in his favour arose and it was for the defendant to adduce admissible evidence to show that at the time of the transaction - this was on 25 April 1981 being the date of the sale and purchase agreement, the plaintiff intended to purchase the said property as a gift to her. It is apparent that upon scrutiny of the entire examination-in-chief of the defendant, not an iota of admissible evidence was adduced to rebut the presumption of trust. Indeed the evidence of the defendant was equivocal, wholly suspect and totally unreliable. As I said the presumption of trust in favour of the plaintiff can only be rebutted by cogent and unequivocal evidence of acts, circumstances and declarations at the time of the said transaction – on 25 April 1981, which would negative the presumption of trust. In my judgment, an assertion by the defendant that "before 1981, the plaintiff always mentioned to me that if he has money, he would buy me a house so that I could bear him some children ..." cannot come within the ambit of admissible evidence when viewed against the backdrop that the relationship between the plaintiff and the defendant started as early as 1969. For the defendant to assert that in 1981 the plaintiff "bought for me a property in Johor Bahru and he did not tell me that he registered the property in my name as his trustee" was an assertion that was devoid of any evidential value as it was not in dispute that the plaintiff purchased the said property in the name of the defendant. Furthermore, and this must be the crucial factor, the assertion by the defendant that the plaintiff "bought the property for me and our children" reduced the sting of the defence contention that the said property was purchased by the plaintiff as a gift to her absolutely. It must not be forgotten and it is not a question of semantics that there is a fundamental difference between the plaintiff purchasing a gift for the defendant absolutely and the plaintiff purchasing the said property for the defendant and the children.

Another angle to explore would be this. In cross-examination, the defendant testified that the said property was intended to be a matrimonial home and was purchased for the benefit of herself, her son and the plaintiff. This was another version of the defendant to rebut the presumption of trust - a wholly inconsistent nature of the defendant's evidence with regard to the vital issue. Consequently, I have no hesitation to reject the defendant's evidence concerning a purported gift of the said property by the plaintiff to her. It immediately comes to the forefront of my mind when considering the credibility or otherwise of the defendant's evidence to regurgitate the sage words of Lord Wright in the case of *Powell & Wife v. Streatham Manor Nursing Home* [1915] AC 243, 267 which was applied and cited with approval by Edgar Joseph Jr. J. (now FCJ) in *Tan Cheng Hock v. Chan Thean Soo & Anor* [1987] 2 MLJ 479. His Lordship Edgar Joseph Jr. J. (now FCJ) observed:

> It may be well to also remember what was said by Lord Wright and often quoted from his judgment in *Powell & Wife v. Streatham Manor Nursing Home, of* the possibility of judges being deceived by adroit or plausible knaves or by apparent innocence. Much to the same effect, though in more illustrative terms, is what Lord Devlin, quoting from MacKenna J. said in his book 'The Judge' (1969) at page 63 and which I now reproduce:
>
> > The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is over-rated. ... I would adopt in their entirety (this being the highest form of judicial concurrence) the words of Mr. Justice Mackenna: 'I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

Mr. Ho Thian Cheh, the learned counsel for the plaintiff, submitted that the court must exercise the greatest caution and circumspection in the face of the apparent innocence of the defendant. In my judgment, beneath the veneer of apparent innocence is a crafty woman, streetwise, ice-cool, calculating and ready to change her testimony to suit her purpose. It was pointed out that in her evidence-in-chief, the defendant stated that she was charged for being in possession of a forged Indonesian passport as reflected at p. 67 of the notes

of evidence and arising out of it she was detained in Kuala Lumpur prison for a few months. Under cross-examination, the defendant adopted a different stand and changed her testimony when she testified that she was detained because she was in possession of a forged Malaysia passport and she pointed the accusing finger at the plaintiff. Again, in cross-examination the defendant testified that the title deed was in her custody in the safe of a Singapore bank but she was uncertain and was unable to say when this took place. She testified further that the title deed was not kept in the office of the plaintiff at Fu Lu Shou complex in Singapore but in her own safe. It was her testimony, that all the documents bearing her name were kept by her. But when she was asked as to when she first talked to the plaintiff about the return of the title deed, she answered in this fashion:

> There was a time when I went to the plaintiff's office to collect my passport and other things and the plaintiff assaulted me.

This meant that all along, contrary to her evidence, her passport and other things which belonged to her were actually kept at the plaintiff's office. If this was not the correct inference, why should she go to the plaintiff's office to collect them.

It can be recalled that when the plaintiff testified that he was in possession of all the relevant documents pertaining to the purchase of the said property, to wit, stamped copies of the sale and purchase agreement, the title deed, the original receipts of payments made in regard to the purchase and all the other correspondences, the plaintiff was not challenged at all by way of cross-examination. Instead the defendant saw it fit to say in her testimony for the first time that the documents bearing her name – which must include the title deed to the said property, were kept by her.

Reverting back to the issue of the plaintiff assaulting the defendant as alleged by the defendant, there was an added interesting twist to it. When the defendant was questioned as to whether she lodged a police report in regard to that assault she changed her version and testified that the plaintiff wanted to assault her but ended up assaulting her child and her sister. On being pressed further, she relented and said that she did not lodge a police report against the plaintiff. Again when she was questioned as to why she did not take any action to recover the title deed to the said property since it was her contention that the said property was hers, she gave a very evasive reply. The defendant was prepared to listen to her neighbour's advice to the effect that she could make a Statutory Declaration that the land title was missing notwithstanding the fact that she knew that the land title was with the plaintiff.

Mr. Ho Thian Cheh rightly submitted that the defendant's evidence concerning the rebuttal of the presumption of trust in favour of the plaintiff was wholly unsatisfactory, inadequate and should be rejected. The defendant's evidence when viewed in its totality can readily be classified as inherently improbable. Her evidence was pregnant with inconsistences and contradictions and it amounted to no more than this that it was alien to the defence contention that the said property was a gift. In short, the defence version was against the grain of the evidence adduced by the plaintiff. On material particulars, the evidence of the plaintiff was not challenged by way of cross-examination.

A crucial question to be posed would be this: Would a tight-fisted plaintiff who admitted to having sex with the defendant in a cheap room in a sleazy hotel and also in a room belonging to a friend, be magnanimous and offer the defendant the said property by way of a gift? The answer would be in the negative because to answer in the affirmative would be to go against the grain of the plaintiff's character and it would therefore be highly improbable. Furthermore, the plaintiff's assertions that he purchased the said property for investment and as a convenient meeting place with the defendant strikes the cord of probability. It was credible and should be accepted. In *Tan Cheng Hock v. Chan Thean Soo & Anor (supra)*, his Lordship Edgar Joseph Jr. J. (now FCJ) made a declaration in favour of the plaintiff in respect of a property registered in the name of the defendants but paid by the plaintiff. In *Law Tanggie v. Untong ak Gantang & Anor* [1993] 2 MLJ 530, the court made a finding that the first defendant there held the relevant land on trust for the plaintiff as he had furnished the consideration for the purchase. This case also laid down the principle that there was no need for the trust to be reduced in writing. The then Federal Court in *Wan Naimah v. Wan Mohamad Nawawai* [1974] 1 MLJ 41 FC (comprising of Azmi L.P., Suffian C.J. and Ali F.J.) held that the trust deed need not be in writing and found that the defendant, the registered proprietress held an undivided half share in the relevant land on trust for the plaintiff. Going across the ocean would be an old vintage case of *Dyer v. Dyer* [1788] 2 Cox, Eq. Cas. 92, 93 where an implied trust was said to arise in this situation:

> Where A provides money for the purchase of property from a vendor, V, but instructs V to convey the property, not to himself, but to B. Here it is inferred that since A provided the purchase money, he intended B to hold the property not beneficially but as trustee, on trust for himself, A.

Fowkes v. Pascoe [1875] 10 Ch. App 343 lays down the proposition that equity presumes that it was the intention of the person who provided the purchase money, that the person to whom the legal title is conveyed should hold it on trust for him. This is only a presumption, and like all other presumptions, it

can be rebutted and rebuttable. Thus, if A pays for shares and directs V to convey them to B, and B is able to produce evidence, in the form of a letter from A which shows that the shares were intended as a gift, then the presumption of a trust is rebutted and B takes the shares absolutely.

The case of *Soar v. Foster* [1858] 4 K & J 152 is more appropriate and applies squarely to the factual matrix of the present case. The principle that can be distilled from this case is that there is no presumption of a gift where a man buys property and has it conveyed into the name of his mistress.

It is now apparent that the defendant through their counsel Messrs Leng & Co sought to introduce two new defences which were not pleaded in the statement of defence. The first line of defence was on the doctrine of laches where it was said that the presumption of a resulting trust will not be raised after a long lapse of time. The second line of defence was on the doctrine of equitable estoppel and reliance was placed on the decision of Gopal Sri Ram JCA in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Ltd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 FC.

Now, from time immemorial it has been a fundamental principle of litigation that the parties to an action are bound by their pleadings. The trial court must adjudicate upon the framework of the issues raised in the pleadings. To go astray from the pleadings would be a taboo.

In *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 2 MLJ 152 S.C., Gunn Chit Tuan S.C.J. speaking for the then Supreme Court ruled that:

> As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed and the order of the learned judge in dismissing the plaintiff's claim set aside.

His Lordship Gunn Chit Tuan SCJ in delivering the decision in *Yew Wan Leong v. Lai Kok Chye (supra)* cited with approval the following passages in the decision of Mohamed Azmi SCJ in *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 CLJ 577; [1989] 2 MLJ 416 SC:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p. 233:
>
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...'.

In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 MLJ 428 SC, his Lordship Jemuri Serjan SCJ after referring to several popular authorities observed:

> All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

In the early part of the same judgment, his Lordship Jemuri Serjan SCJ in lucid terms said:

> It does not seem necessary for us to emphasise and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how such lapses in the courts should be tolerated at the expense of the clients.

Incidentally, it is germane to mention, with the greatest respect, that in *Muniandy & Anor v. Muhammad Abdul Kader & Ors (supra)* and in *Lee Ah Chor v. Southern Bank Bhd (supra)*, Gopal Sri Ram (now JCA) acted for the appellants in both these cases.

I am bound by the decisions of the then Supreme Courts and, consequently, the two new defences that were not pleaded will not be considered by me.

But it was argued for the defendant that even though the doctrine of laches and equitable estoppel were not pleaded in the statement of defence, yet the facts gave rise to an estoppel notwithstanding the fact that the term "estoppel" was not employed nor used in the statement of defence. The dicta of Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Ltd (supra)* especially at p. 341 to the following effect, was relied upon:

> In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term "estopped". (See, *Lal Somnath Singh & Ors v. Ambika Prasad AIR* 1950 ALL 121 at page 131). It may be desirable for a pleader to use that term; but it is not fatal if he does not. One must not lose sight of the object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 at page 320.

It is instructive to note that *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619; [1995] 1 MLJ 308 is a decision of his Lordship Gopal Sri Ram JCA who wrote the decision for the Court of Appeal. At p. 320 of the report, his Lordship said:

> That brings me to the defendants' second argument, which is that the point now under consideration was never raised by the plaintiff in his pleaded case. There is certainly a reference to the letter of dismissal in para 8 of the statement of claim accompanied by an allegation in para 9 that the plaintiff had not been given a reasonable opportunity of being heard.
>
> I respectfully agree with the observation made during the course of argument by my learned sister, Siti Norma Yaakob JCA, that once the fairness of the procedure adopted was sufficiently raised and challenged then all matters relevant thereto were put in issue without the need for a specific plea in that respect. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Commodore Pty Ltd v. Perpetual Trustee* [1984] 1 NZLR 324 at page 349.
>
> I really do not see how the defendants can complain that they were taken by surprise; more so when they made no complaint before the trial judge when the point was raised by counsel for the plaintiff in his submissions. Further, there is nothing in the judge's note to say that the argument was being disregarded because it was not pleaded. In these circumstances, I am convinced that there is no merit in the pleading point.

Two salient features appeared in *Raja Abdul Malek Muzaffar Shah*. Firstly, the statement of claim at para. 8 and 9 referred to the letter of dismissal and the allegation that the plaintiff was not accorded a reasonable opportunity of being heard. The same cannot be said of the statement of defence in the present case. Secondly, the defendants' counsel did not object when the point was first raised before the trial judge at submission stage. Here, in the present case, Mr Ho Thian Cheh took exceptions to the submissions of counsel for the defendant who submitted for the first time the two new defences that were not pleaded.

It is also instructive to note and with respect that on the question of pleadings, *Boustead Trading and Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman* did not consider at all the then Supreme Court decisions of *Muniandy & Anor v. Muhammad Abdul Kader & Ors (supra), Yew Wan Leong v. Lai Kok Chye (supra) and Lee Ah Chor v. Southern Bank Bhd (supra).*

In *Mohamad Safuan bin Wasidin & Anor v. Mohd. Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187, I did say:

> In his oral evidence before the Sessions Court, Sungai Siput, Perak, the first appellant gave evidence and deviated from his pleaded defence. The deviation would place the testimony of the first appellant highly suspect (*PR Panickar v. Chwee May Kwong & Anor* [1958] MLJ 136). It is now trite law that where the particulars of negligence as pleaded by the defence, drafted presumably on instructions, differ drastically and entirely from the version given by the defendant in court, the court is entitled not to accept the defendant's story (*Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor* [1976] 1 MLJ 252).

Mr. Ho Thian Cheh rightly pointed out that the importance of pleadings are clearly recognised in the Rules of the High Court, 1980 ("RHC") and it finds expression in O. 18, rr. 8 (1) and 10 (1) of the RHC. Obviously, the defendant has gone astray from the statement of defence when the two new defences were advanced at the submission level. This should not be allowed at all costs. The law as crystallised in numerous authorities, be it local or foreign, is clear. You are bound by your pleadings.

A great deal of emphasis was laid by the defendant on the following evidence that appeared in the notes of evidence and from it, it was argued rather admirably that there was this evidence of a gift. For fear of repetition, the evidence went like this:

> Before 1981 the plaintiff always mentioned to me that if he has money he would buy me a house, so that I could bear him some children. In 1981 he bought for me a property in Johor Bahru and he did not tell me that he registered the property in my name as his trustee. The plaintiff told me that he bought the property for me and for our children.

On the authority of *Gissing v. Gissing* [1971] AC 886, this piece of evidence did not give rise to any legal consequences at all. It did not confer the entire beneficial interest in the said property on the defendant. *Gissing v. Gissing* was a decision of the House of Lords. There a house was bought in the name of the appellant husband as the matrimonial home in which the parties lived until November 1961, when the appellant husband left to live with another woman. The price paid for the house was 2695 pounds of which 2150 pounds was raised by the appellant husband on mortgage and 500 pounds was loaned by the printers to the appellant husband who then paid the balance and costs. The respondent wife paid 220 pounds out of her savings for furnishings and the laying of a lawn. When the appellant husband left sometime in November 1961 he told the respondent wife (this is the interesting part) that the house was hers and that he would pay the mortgage instalments and outgoings, which he dutifully did. The respondent wife remained in the house and sometime in January 1966 she was granted a divorce. The respondent wife then applied for an order regarding her beneficial interest in the house. Buckley J. held

that the appellant husband was the sole beneficial owner of the house and was entitled to possession. The Court of Appeal reversed his decision. The House of Lords allowed the appeal by the appellant husband and held that the wife had made no contribution to the acquisition of title to the matrimonial home from which it could be inferred that the parties intended her to have any beneficial interest in it. The House of Lords held that no probative or evidential value was attached to the appellant husband's statement that the house was hers. Likewise, in the present case no probative value ought to be attached to the defendant's statement that before 1981 the plaintiff "always mentioned to me that if he has money, he would buy me a house so that I could bear him some children." Using *Gissing v. Gissing* as a leverage, the inevitable conclusion would be that judgment should be given to the plaintiff as he had paid the full purchase price of the said property in the same way as the appellant husband did in *Gissing v. Gissing*.

Lord *Morris in Gissing v. Gissing* did say that:

> In the infinite variety of circumstances that may arise there will be cases where there is separate ownership of property in a husband and cases where there is separate ownership in a wife and cases where there is joint ownership: there may be a payment which gives rise to a resulting implied or constructive trust: there may be a gift of money by one to the other: there may be a loan from one to another: there may be services rendered in respect of which some reward was expressly or impliedly promised: there may be services rendered without any contemplation of any such result: there may be services rendered or payments made without any thought that any property rights could be or would be in any way affected. When the full facts are discovered the court must say what is their effect in law. The court does not decide how the parties might have ordered their affairs: it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstances that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment.

Using the above quoted passages, it was argued for the defendant that the courts have extended the principle of advancement between a husband and wife to that of an unmarried couple. This argument was completely erroneous. The learned counsel for the Queen's Proctor in *Pettitt v. Pettitt* [1970] AC 777 H.L. described the principle of advancement in this way (see p. 788 of the report):

> As to the presumption of advancement, the presumption that a husband by putting a house in his wife's name is making a gift to her is, in the context of modern social conditions, quite artificial and wrong.

Lord Reid in Pettitt v. Pettitt (supra) observed at p. 793 of the report: *a*

> It was argued that the present case could be decided by applying the presumption regarding advancement. It was said that if a husband spends money on improving his wife's property, then, in the absence of evidence to the contrary, this must be regarded as a gift to the wife. I do not know how this presumption first arose, but it would seem that the judges who first gave effect *b* to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present *c* conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been diminished. I do not think that it would be proper to apply it to the circumstances of the present case.

In short, Lord Reid in *Pettitt v. Pettitt (supra)* was of the view that the *d* principle of advancement had outlived its usefulness and, consequently, he held the view that the presumption of advancement did not apply to the circumstances of the case.

Lord Hodson in *Pettitt v. Pettit (supra)* at p. 811 was of the view that the *e* presumption of advancement had lost its lustre and this was how he put it:

> Reference has been made to the 'presumption of advancement' in favour of a wife in receipt of a benefit from her husband. In old days when a wife's right to property was limited, the presumption, no doubt, had great importance and today, when there are no living witnesses to a transaction and inferences have *f* to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect.

Not a single authority was advanced to support the proposition that the *g* presumption of advancement applies to the factual situation like the present case where the plaintiff purchases the said property in the name of his mistress and pays the full purchase price. In my judgment, in the context of modern social conditions the principle of advancement has been displaced forever for to hold otherwise would be tantamount to: *h*

(1) taking a reversal or a retrograde step thereby stifling the development of the law;

(2) running counter to the mainstream of prevailing authorities; and

(3) performing the function of the Legislature. *i*

There were other inconsequential points that were raised by the defendant which will not be ventilated here as they would not affect the outcome of this judgment one way or the other.

For the reasons adumbrated above, I gave judgment to the plaintiff particularly in regard to para. 9 sub-paras. (a), (b), and (c) of the Statement of Claim. Costs should rightly go to the plaintiff.

In regard to the counterclaim, the defendant sought at para. 16 for the following orders:

(a) to deliver to the defendant the issue document of title to the said property;

(b) maintenance for the said Goh Tiong Sin as from December 1988;

(c) an order that the private caveat entered by the plaintiff through presentation no: 5233/90 volume 474 folio 15 on 23 August 1990 be withdrawn and removed;

(d) costs; and

(e) such further or other relief as this Honourable Court may deem fit and proper.

Through the clandestine and illicit affair with the plaintiff the defendant gave birth to an illegitimate son by the name of Goh Tiong Sin, a handsome boy with the defendant's striking features. No evidence was adduced in regard to the maintenance of the boy and the parties too did not seem to be bothered about prayer (c) of the counterclaim. Consequently, I dismissed the defendant's couterclaims at sub-paras. (a), (b), and (c) of the para. 16 with costs.